

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
NORTHEASTERN DIVISION  
AT GREENEVILLE

SEP 15 1 02 PM '05

U.S. DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE

BY \_\_\_\_\_ DEPT. CLERK

Southern Appalachian Biodiversity Project and  
Wild South,

Plaintiffs,

v.

United States Forest Service and  
Dale Bosworth in his official capacity as Chief  
Of the United States Forest Service,

Defendants.

Case No. 2:05CV240

Complaint for Declaratory  
and Injunctive Relief

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COMPLAINT

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Plaintiffs, through counsel, aver as follows:

**INTRODUCTION**

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., for declaratory, injunctive, and other appropriate relief to bring about the immediate processing and release of agency records requested by the Plaintiffs from the United States Forest Service, an agency of the federal government situated within the U.S. Department of Agriculture.

2. The United States Forest Service and its Chief, Dale Bosworth, have violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by denying requested documents based on an improper application of a FOIA exemption, and further by failing to reply to the Plaintiffs'

administrative appeal of that denial. This action seeks an order declaring that the Forest Service and its Chief acted illegally by failing to respond to the Plaintiffs' administrative appeal and by improperly withholding the information initially requested by the Plaintiffs, an order requiring the Defendants to obey FOIA by immediately providing the information requested by the Plaintiffs, and an order requiring Defendants to pay the costs of this action, including a reasonable attorney's fee.

### **JURISDICTION AND VENUE**

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331(a) (federal question) and 5 U.S.C. § 706 (Administrative Procedure Act).

4. Venue in this court is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

### **PARTIES**

5. **Wild South** is a 501(c)(3), regional nonprofit organization based in Alabama and active in the protection of the National Forests and native species of Alabama, Mississippi, Louisiana, Florida, Tennessee and other states in the South. Wild South is involved in a broad range of environmental issues, and its members have dedicated themselves to preserving and enhancing the South's environment. Wild South's members regularly use and enjoy the environment, waters, forests, air and lands of the National Forests in Tennessee. Wild South's

members and staff recreate in all the National Forests in Tennessee, and they enjoy the biological diversity found in all the National Forests in Tennessee. Wild South and its staff and members regularly comment on and appeal projects on National Forests throughout the South, including projects in all the National Forests in Tennessee. The violations of law described in this complaint, in particular the withholding of properly requested documents under the FOIA and failure to respond to the administrative appeal, will irreparably and adversely affect Wild South's members' interests in the National Forests of Tennessee, as well as their ability to effectively participate in the management of National Forests throughout Tennessee.

b. **Southern Appalachian Biodiversity Project** ("SABP") is a non-profit, grassroots environmental organization dedicated to protecting and conserving Appalachian forests. SABP has members who reside near, visit, and or otherwise use and enjoy the Cherokee National Forest and, specifically, the area encompassed by the proposed Walnut Mountain timber sale for hiking, camping, recreation, wildlife viewing, educational and scientific purposes, and aesthetic and spiritual enjoyment. These interests are directly and irreparably injured by Defendants' violations of law described in this complaint.

6. The Plaintiffs monitor the use of national forests for compliance with the laws respecting those forests, educate their members and the public concerning management of these forests, and advocate policies and practices that conserve the natural value and long-term health of these forests and their waters. These interests are directly and irreparably injured by Defendants' violations of law described in this complaint.

7. The **United States Forest Service** ("Forest Service") is an agency of the United States Department of Agriculture entrusted with the conservation and management of the national forests, including the Cherokee National Forest.

8. Defendant **Dale Bosworth** is Chief of the Forest Service, and he is sued in his official capacity as such. Chief Bosworth is ultimately responsible for all decisions made by the Forest Service. Further, he is the officer that was ultimately responsible for replying to the Plaintiffs' administrative appeal of the Forest Service's denial of information requested by Plaintiffs.

### **FACTUAL BACKGROUND**

9. On August 23, 2004, Candace W. Allen, the District Ranger for the Watauga Ranger District in the Cherokee National Forest in Tennessee proposed the Walnut Mountain Project, affecting 844 acres of National Forest land in Carter County and including the construction of 4 miles of new temporary roads. See exhibit 1.

10. On September 28, 2004, WildLaw submitted comments on the Walnut Mountain Project on behalf of Wild South and the Southern Appalachian Biodiversity Project (SABP). See exhibit 2.

11. On September 29, 2004, WildLaw also submitted a Freedom of Information Act request on behalf of the same two organizations to Kaye Shelton, the designated FOIA Coordinator for the Cherokee National Forest. See exhibit 3.

12. The purpose of the request was to discover the viable alternatives (see, e.g. 42 U.S.C. § 4332) that should have been, but were not considered publicly (see, e.g. 40 C.F.R. § 1501.2) in the Walnut Mountain Project. The Forest Service has offered a minimal number of alternatives for the project and they appear to be almost identical. The language of the Project

Proposal makes clear that viable alternatives were discarded without ever being shared with the public.

13. On November 3, 2004, H. Thomas Speaks, Jr., the Forest Supervisor for the Cherokee National Forest, sent a letter acknowledging receipt of the request by his Forest on October 12, 2004, indicating that a response would be forthcoming “no later than November 24, 2004.” See exhibit 4.

14. On November 9, a partial response comprised of 314 of the 1,052 pages identified as responsive to the FOIA request was sent from H. Thomas Speaks’ office.

15. The request was sent on to the Forest Service’s Southern Region Office for further review.

16. In a December 13, 2004 telephone conversation with Plaintiffs’ counsel, Andrea Csergei, the Regional FOIA coordinator for the Forest Service stated that the Southern Region Office did not intend to release any further documents.

17. The Southern Region Office refused (under cover of a letter dated December 16, 2004 and signed by Robert T. Jacobs, the Regional Forester) to release any additional documents, citing Exemption 5 of the FOIA and stating that the withheld documents included “draft documents, draft alternatives and email messages between colleagues containing opinions, internal debates and deliberations.” See exhibit 5.

18. The December 16 letter also stated that while Plaintiffs’ fee waiver was not considered, further information would need to have been submitted before the agency would “contemplate granting [our clients’] request.” Plaintiffs’ original FOIA request included appropriate language entitling them to the waiver of fees for searching and document reproduction that the FOIA contemplates.

19. On January 21, 2005, WildLaw submitted an administrative appeal of the denial of the remaining documents identified as responsive to the September 29, 2004 request to the Records and Information Services section of the Washington Office of the Forest Service. See exhibit 6.

20. This appeal was assigned the control number 05-2799-A in a February 2, 2005 letter signed by Sherry L. Turner, the Acting Freedom of Information Act/Privacy Act Officer for Records and Information Services.

21. By law, 5 U.S.C. § 552(a)(6)(A)(ii), a response was due before March 8, 2005.

22. On March 9, 2005, WildLaw submitted a letter to the Washington Office inquiring why no response had been received. See exhibit 7.

23. On April 1, 2005, WildLaw contacted Nona Jones of the Washington Office's FOIA team via telephone and received assurances that a response to Plaintiffs' request would be immediately forthcoming.

24. On April 13, Charles Myers, Nona Jones' supervisor at the Washington Office, promised a status letter would immediately be sent to WildLaw.

25. On May 9, having received neither a status letter nor documents, WildLaw submitted a second follow-up letter to the Washington Office. See exhibit 8.

26. On May 19, Cecile Gray, another Forest Service employee, left a telephone voice message for WildLaw stating that the Forest Service was "doing a second review to assure that their findings were correct." In an attempt to follow up on this message, WildLaw left multiple messages for Ms. Gray (on May 20, 23, 24), which were not returned.

27. On June 3, 2005, WildLaw was finally able to contact Sherry Turner, the Acting Freedom of Information Act/Privacy Act Officer for Records and Information Services, via

telephone. She stated that her office had “only just gotten the records recently” from the Southern Region Office, that her office would still have to go through the documents one more time, and that the response would have to go to legal counsel at the U.S. Department of Agriculture before any action could be expected by Plaintiffs.

28. On June 9, 2005, WildLaw contacted Karen Carrington of the U.S. Department of Agriculture Office of General Counsel regarding the appeal. Ms. Carrington promised to look for the appeal.

29. On June 10, 2005, WildLaw received a fax from Sherry Turner (See exhibit 9.) indicating that she had been contacted by Ms. Carrington, stating the following:

- a. that the appeal had not yet been sent to OGC,
- b. that the 738 unreleased but responsive pages were received by her office from the region on March 9, 2005,
- c. that the Forest Management staff had not yet sent a review and that she (Sherry Turner) would conduct a review of the records herself “this week”
- d. that she would confer with the Southern Regional FOIA Coordinator and the Forest FOIA Coordinator on Tuesday, June 14, 2005,
- e. that she “expect[s] that additional records will be released to you in response to [our] appeal and that a partial response will be prepared next week for concurrence by the Forest Management Staff Director and signature by the Deputy Chief,”
- f. that the appeal response will then be sent to the U.S. Department of Agriculture Office of General Counsel for review for legal sufficiency, and

that she will notify WildLaw when she forwards the proposal for final appeal response review by OGC.

30. On June 23, 2005, counsel for Plaintiffs contacted Sherry Turner and Sandra Dover to determine status of the remaining documents.

31. On July 13, 2005, counsel for Plaintiffs contacted Sherry Turner by telephone to determine when a response could be expected. A partial response was mailed the following day and the remaining documents were sent to the Office of General Counsel. See exhibit 10.

32. On July 25, counsel for Plaintiffs once again contacted Sherry Turner and was told that Peter Chen of OGC was now responsible for the response.

33. On August 10, counsel for Plaintiffs contacted Peter Chen and left a message inquiring about the status of the remaining documents. On August 14, 2005 Peter Chen of the Office of General Counsel for the U.S. Department of Agriculture contacted counsel for Plaintiffs by phone, leaving a message stating that the review was slowed because of the volume of material being withheld by the agency in general, including the refusal of one office to release any documents at all to the public. He also said that the Plaintiffs request would be expedited.

34. As of the date of this filing, no additional documents have been released, and WildLaw has received no response from the OGC.

35. Plaintiffs have exhausted all administrative remedies. The Forest Service is required to make a "determination" on the merits of a FOIA appeal within 20 working days of receipt. 5 U.S.C. § 552(a)(6)(A)(ii). While the Forest Service can extend the response deadline by up to 10 working days in "unusual circumstances," it would have had to give written notice to the requester, which was not done. 5 U.S.C. § 552(a)(6)(B)(i). The appeal was received by the



Forest Service on February 2, 2005. See exhibit 11. A final response has yet to be received by Plaintiffs.

**LEGAL FRAMEWORK**  
**(Freedom of Information Act and Administrative Procedures Act)**

Paragraphs 1 through 35 are incorporated by reference.

36. The Freedom of Information Act, 5 U.S.C. § 552, as amended, requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies.

37. Upon receiving a FOIA request, an agency has twenty working days to issue a determination on a FOIA request, informing the requester what documents the agency will release, what documents the agency plans to withhold, the reasons justifying any such withholding, and the appeal rights available to the requester. 5 U.S.C. § 552(a)(6)(A).

38. Although the agency may grant itself an extension of ten additional days in “unusual circumstances,” the FOIA does not permit an agency to delay a response indefinitely. 5 U.S.C. § 552(a)(6)(B). Regulations identify specific “unusual circumstances” that may justify a 10-day extension. 43 C.F.R. § 2.17(c) (2001). Regulations also require Forest Service to notify the requestor in writing of such an extension, and to state the reason for its extension of time. 43 C.F.R. § 2.17(d) (2001).

39. FOIA requires an agency to determine whether to provide expedited processing if requested within 10 days after the date of the request. 5 U.S.C. § 552(a)(6)(E)(ii)(I).

40. Under FOIA, a requester is entitled to a waiver or reduction of fees associated with responding to a FOIA request when the information sought “is likely to contribute

significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii). Plaintiffs in this case submitted a request for such a waiver of fees, and met all of the statutory requirement for entitlement to such a waiver of fees.

41. FOIA requires an agency to make a determination with respect to an appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A).

42. FOIA provides that a requester “shall be deemed to have exhausted his administrative remedies. . . if the agency fails to comply with the applicable time limit provisions.” 5 U.S.C. § 552(a)(6)(A).

43. This Court has jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

44. An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption..

45. FOIA provides for attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E). Attorney fees may be awarded when the Plaintiff has "substantially prevailed."

#### **CLAIM ONE**

(Failure to Reply to Appeal of FOIA Request Denial)

46. Based on the above-cited facts and legal obligations, the Defendants were required to respond to the Plaintiffs' administrative appeal of the Defendants' denial of the Plaintiffs' FOIA request.

47. On February 2, 2005, Defendants received the Plaintiffs' administrative appeal of the Defendants' decision to deny the Plaintiffs' FOIA request. That triggered the 20 working-day

time limit in which the Defendants had to respond to the appeal under 5 U.S.C. § 552(a)(6)(A)(ii). That time limit expired well before March 8, 2005.

48. Because the Defendants have failed to reply (as of the date of the filing of this complaint, far outside the 20 working-day limit set by statute) to the Plaintiffs' administrative appeal, they are in violation of FOIA and USDA regulations. Defendants' failure is arbitrary, capricious, and otherwise not in accordance with law, and/or constitutes final agency action unlawfully withheld or unreasonably delayed.

## **CLAIM TWO**

(Violations of the Freedom of Information Act and the Administrative Procedure Act)

49. The allegations contained in paragraphs 1-48 are incorporated herein by reference.

50. FOIA requires that a federal agency make available records "promptly" upon request, 5 U.S.C. § 552(a)(3)(A), that a federal agency determine "within 20 days" whether to comply with a request, and that the agency "immediately" notify the requester of the determination and of the right to appeal any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i).

51. FOIA permits agencies to withhold records or portions of records under certain circumstances. 5 U.S.C. § 552(b). However, where an agency denies a request for records, it must adequately explain the reasons for each denial, and reference the specific exemption or exemptions authorizing the withholding. See 43 C.F.R. § 2.21(d)(2). Agencies must provide to the requester "[a]ny reasonably segregable portion of a record ... after deletion of the portions which are exempt ...," *id.*, which is to say that the agency must disclose the factual material in those documents. Agencies must also provide an itemized *Vaughn Index* of any withheld

documents that describes each document or withheld portion and gives a detailed justification of the agency's ground for the withholding. In addition, FOIA places the burden on the agency to sustain the lawfulness of specific withholdings. See 5 U.S.C. § 552(a)(4)(B).

52. Defendants have failed to make available the records requested by Plaintiffs. Defendants have improperly withheld records or portions of records, in violation of 5 U.S.C. § 552(b) and 43 C.F.R. § 2.21(d)(2). Specifically, Defendants have failed to adequately explain the reasons for each denial, improperly claimed the benefit of a specific exemption authorizing the withholding (Exemption 5) which does not apply to said withheld documents, and failed to provide an itemized *Vaughn Index* of any withheld documents that describes each document or withheld portion and gives a detailed justification of the agency's ground for the withholding.

53. Defendants have also failed to provide "[a]ny reasonably segregable portion of a record ... after deletion of the portions which are exempt ...." 5 U.S.C. § 552(b).

54. Defendants' failure to comply with its above-described duties violates FOIA and USDA regulations. Defendants' failure is arbitrary, capricious, and otherwise not in accordance with law, and/or constitutes final agency action unlawfully withheld or unreasonably delayed.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs respectfully request that the Court:

1. Declare that Defendants illegally failed to respond to Plaintiffs' administrative appeal;
2. Declare that Defendants were not justified in asserting an exemption under 5 U.S.C. § 552(b)(5) to deny the documents requested by Plaintiffs, and thus improperly withheld

agency records from Plaintiffs; and that the Plaintiffs are entitled to a waiver of fees associated with their request;

3. Order the Forest Service to release all documents responsive to the Plaintiff's initial FOIA request pursuant to the Freedom of Information Act;

4. Order the Forest Service to produce forthwith an itemized Vaughn Index of any withheld documents that describes each document or withheld portion and gives a detailed justification of the agency's ground for the withholding;

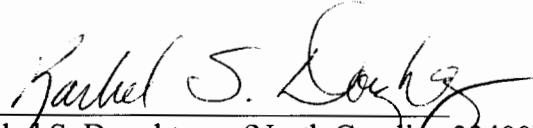
5. Enter appropriate injunctive relief to prevent the Forest Service from destroying any of the documents while this matter is in dispute or during any extension that may be granted for their response;

6. Award Plaintiffs reasonable attorney's fees and expenses;

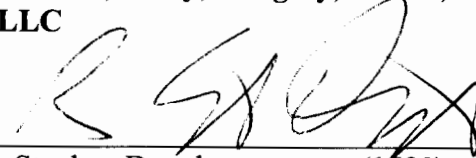
7. Tax all costs against Defendants; and

8. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

  
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